

STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
v.
Daniel Thomas Macey,
Defendant.

**ORDER AND MEMORANDUM ON
DEFENDANT'S MOTION TO DISMISS**

MNCIS No. 27-CR-15-33508

Judge Hilary Lindell Caligiuri

This matter came before the undersigned Judge of District Court on November 22, 2016, for a joint motion hearing on three codefendants' cases.¹ Judith Hawley and Christopher Freeman appeared for the State. Ryan Garry appeared for Defendant Macey, who was also present. Alexander DeMarco appeared for Codefendant Backman, who was also present. Robert Jones appeared for Codefendant Gustavsson, who was also present.

Defendant submitted a Memorandum in Support of Motion to Dismiss on March 3, 2016. The State submitted a Response to Defendant's Motion to Dismiss on June 23, 2016. The State also filed an amended complaint, adding Counts Two through Six on June 23, 2016. Defendant filed a response to the State's Memorandum as well as a Motion to Dismiss Counts Two through Six on September 19, 2016. On February 9, 2017, by invitation of the Court, Defendant sent a letter containing additional argument.

There was no live testimony on the motion to dismiss. The Court heard oral argument from all parties on November 22, 2016. On all three files, the Court received into

¹ The two other codefendants, Joseph Backman (27-CR-15-33506), and Nathan Gustavsson (27-CR-15-33507), also filed motions to dismiss for lack of probable cause.

evidence: C.C.'s statement to Sergeant Metcalf (Exhibit 1); T.K.'s statement to Sergeant Blackwell (Exhibit 2); W.H.'s statement to Sergeant Metcalf (Exhibit 3); W.M.'s statement to Sergeant O'Rourke (Exhibit 4); video and transcript of conversation between Codefendants Macey and Gustavsson (Exhibit 6); Jeff Wold's expert report regarding Defendant's flash drive and hard drive (Exhibit 7); Jeff Wold's *curriculum vitae* (Exhibit 8); packet of various police reports submitted by Defendant (Exhibit 9); Affidavit of Courtney Backman (Exhibit 10); packet of various police reports submitted by Codefendant Backman (Exhibit 11); photograph of Codefendant Gustavsson's face (Exhibit 12); facsimile from Mr. DeMarco to Minneapolis Police (Exhibit 13); flash drive containing various videos and an explanatory memorandum (Exhibit 14); and a police report documenting the text messages recovered from Codefendant Gustavsson's phone (Exhibit 15).² Also before the Court is the State's stipulation of February 17, 2017, that Codefendants Macey and Backman were not present at the time of the shooting.

Based on the file, record and proceedings, as well as the submissions and arguments of counsel, the Court makes the following:

CONCLUSIONS OF LAW

1. Because Defendant was not part of the assembly that disturbed the public peace by an act of violence, Count One is not supported by probable cause.
2. The State's charging multiple counts of Aiding an Offender was proper.
3. Because the evidence does not create a fact issue as to whether Defendant engaged in actions that materially aided Codefendant Scarsella after the shooting, Counts Two through Six are not supported by probable cause.

² No Exhibit 5 was offered or received.

ORDER

1. Defendant's motion to dismiss all counts in the complaint is GRANTED.
2. The attached Memorandum is incorporated herein by reference.

IT IS SO ORDERED.

BY THE COURT:

Dated: February 28, 2017

HILARY LINDELL CALIGIURI
Judge of District Court

MEMORANDUM

I. COUNT ONE – RIOT

Defendant moves to dismiss Count One for lack of probable cause. A motion to dismiss for lack of probable cause should be denied where the facts before the court, including reliable hearsay, “present a fact question for the jury’s determination on each element of the crime charged . . .” *State v. Lopez*, 778 N.W.2d 700, 704 (Minn. 2010) (*quoting State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005)). The trial court’s function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. *See State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976). Ultimately, the issue before the court is whether it is fair and reasonable to require Defendant to stand trial on the complaint. *See Florence*, 239 N.W.2d at 902.

The elements of riot in the second degree are:

First, the defendant was one of three or more persons assembled together.

Second, those assembled disturbed the public peace by an intentional act of or threat of unlawful force or violence to person or property.

Third, the defendant was armed with a dangerous weapon or knew that any other participant was armed with a dangerous weapon.

Fourth, [date and jurisdiction].

10A MINN. PRAC., CRIMJIG 13.115; *see* Minn. Stat. § 609.71, subd. 2 (“When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant who is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon is guilty of riot second degree . . .”).

The complaint here alleges that a group of four individuals, including Defendant, were together at the protest. However, on the basis of multiple witnesses' testimony at Codefendant Scarsella's jury trial, the State has stipulated that Codefendants Macey and Backman were not present at the time of the shooting. In other words, Defendant was assembled with the other codefendants earlier in the night, but, after breaking off from Codefendants Scarsella and Gustavsson, Defendant was no longer assembled with the others. Therefore, it cannot be said that Defendant was one of three or more persons assembled who disturbed the public peace. Because the evidence does not create a fact question for the jury on this issue, the charge of Riot in the Second Degree is dismissed.

II. COUNTS TWO THROUGH SIX – AIDING AN OFFENDER AFTER THE FACT

A. Multiple Counts

Defendant next argues the State's charging him with five counts of aiding an offender after the fact was improper, as each charge relates to the same crime against justice and not to multiple crimes against different victims. *See* Defendant's Memorandum at 9. Indeed, aiding an offender in violation of Minn. Stat. § 609.495 is a crime against the administration of justice, not a crime against a person. *State v. Skipintheway*, 717 N.W.2d 423, 425 (Minn. 2006).

The first element of aiding an offender requires the State to prove that the person Defendant aided – here, allegedly, Codefendant Scarsella – committed a specific crime. *See* 10A MINN. PRAC., CRIMJIG 24.13. While not entirely clear from the complaint, it appears the five counts of Aiding After relate to a single alleged act of concealment or destruction of evidence by Defendant, done to aid Codefendant Scarsella after his assault of five different victims, for which Codefendant Scarsella, himself, has been found guilty on multiple counts.

It seems clear Minn. Stat. § 609.035 would prohibit the imposition of multiple *sentences* for the five counts of Aiding After. *See, e.g., Skipintheday*, 717 N.W.2d at 427 n.5 (noting the appellant's acts of hiding a gun and lying to police officers were not committed in a manner that affected multiple victims, and therefore were not subject to multiple sentences under § 609.035). However, it may be that Defendant would be subject to multiple *convictions* related to the multiple alleged victims. *Compare id.* (reversing multiple sentences but maintaining, without discussion, multiple convictions for actions that aided an offender after crimes against three victims), *with State v. Patch*, 329 N.W.2d 833, 837 (Minn. 1983) (recognizing, under Minn. Stat. § 609.04, that a court may not enter two convictions for one act simply because a defendant's single act violated multiple provisions of a statute).

Whatever the answer to that question, Defendant has offered no authority to support his argument that the very act of charging the Aiding After in five separate counts related to five separate victims was improper. The five counts of Aiding After survive this challenge.

B. Probable Cause

Defendant Macey further argues the complaint lacks probable cause to support the charges of Aiding an Offender After the Fact. The elements of that crime are:

First, Codefendant Scarsella committed the crime of assault.

Second, the defendant knew or had reason to know that Scarsella committed the crime.

Third, the defendant destroyed or concealed evidence of the crime, provided false or misleading information about the crime, or obstructed the investigation or prosecution of the crime.

Fourth, the defendant acted with intent to aid Scarsella.

Fifth, [date and jurisdiction].

10A MINN. PRAC., CRIMJIG 24.13 (citing Minn. Stat. § 609.495, subd. 3).

As to the first element, the complaint alleges Codefendant Scarsella shot five people and later told a police officer that he had done so. The record presents as fact issue as to whether Scarsella committed a crime.

As to the second element, the complaint indicates Defendant was with Codefendants Scarsella, Gustavsson, and Backman minutes before the shooting. Defendant and Codefendant Backman became physically separated from Codefendants Scarsella and Gustavsson prior the shooting, but the four later reconvened and discussed the shooting that had occurred. The record presents a fact issue as to whether Defendant knew Scarsella had committed a crime.

With respect to the third element of Aiding After – destruction or concealment of evidence – the amended complaint alleges “it was learned that the Defendants actively conspired with each other to destroy . . . vital electronic evidence of the shooting.” Specifically, the complaint alleges Defendant stated in a recorded conversation with a codefendant that he had “wiped everything off” a specific flash drive.

Contrary to the State’s characterization of his recorded conversation, Defendant asserts he actually said he “wiped everything *else* off” the flash drive, not that he “wiped everything off.” *See* Defendant’s Memorandum at 5. Having reviewed the recording, the Court cannot conclude whether Defendant Macey said “everything” or “everything else” with respect to wiping the flash drive, although the context of the statement is consistent with Defendant’s proffered explanation.

Defendant offers an expert opinion indicating the only video files deleted from the flash drive were not evidence of the crime, but rather were Japanese cartoons. *See* Exhibit 7. The expert describes the contents of the flash drive as follows:

The three “protest” videos certainly exist, both on the XP HD³ and on the flash drive. I examined the flash drive and found that the media contains a large amount of files, ultimately identified as homework/study files for Dan Macey’s coursework in gunsmithing. There were over 900 deleted files on the flash drive, including the gunsmithing coursework and an additional 15 video files. These files bear names indicative of Japanese Anime and the Create dates on the XP HD also support a weekly download of a new episode . . . I found no artifacts to support that there were any other video files deleted from the flash drive. I found no indication that the file system was wiped to remove artifacts of other deleted files.

Exhibit 7 at 5. Thus, the flash drive, when examined, still contained three clearly-identified videos taken at the Fourth Precinct protest. An uncontroverted expert report identifies the flash drive’s deleted data as coursework and Japanese cartoons. These facts support Defendant’s transcription of the recorded statement and tend to show that Defendant Macey did not erase from the flash drive any electronic evidence of the shooting.

At oral argument, the State indicated it did not take issue with the expert’s findings. However, the State argued Defendant Macey could have been referring, in his “wiping” comment, to a different flash drive. While this theoretically could be true, the State has presented no evidence that a different flash drive containing evidence of the shooting exists or existed. It is, of course, the State’s burden to create a fact issue as to each element of the crime. The facts before the Court thus do not contain probable cause to believe Defendant Macey destroyed or concealed evidence of a crime or took any other action satisfying the third element of Aiding After.

The fourth element of the crime – taking said action with intent to aid Codefendant Scarsella – necessarily fails because there was no specific action shown. It bears mentioning,

³ The term “XP HD” refers to a hard drive recovered from Defendant Macey’s computer. *See* Exhibit 7 at 1, 3.

furthermore, that nowhere in the record, or in the record of the codefendant's jury trial, was any evidence that this Defendant had ever expressed or acted upon racial animus.

The fifth element – date and jurisdiction – is not at issue.

The facts before the Court, thus, do not create a jury issue as to the third or fourth elements of the charged crime of Aiding an Offender After the Fact. Consequently, it is not fair and reasonable that Defendant Macey stand trial on charges of Aiding After, and Counts Two through Six are dismissed.

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